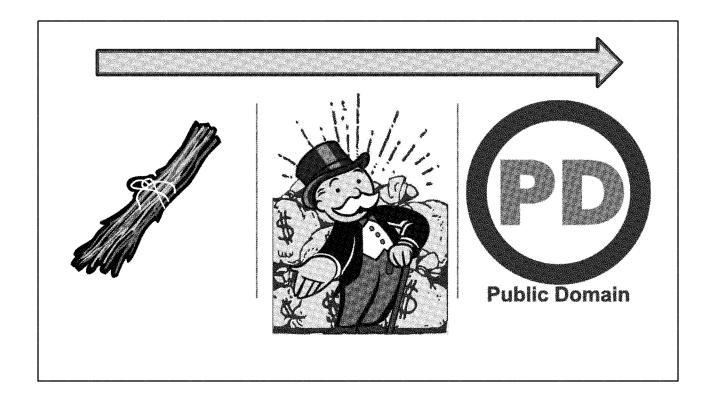
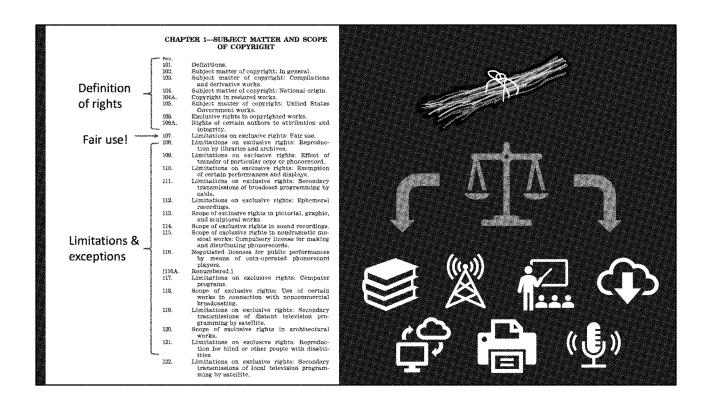
McNamara Declaration Exhibit 27 part 3



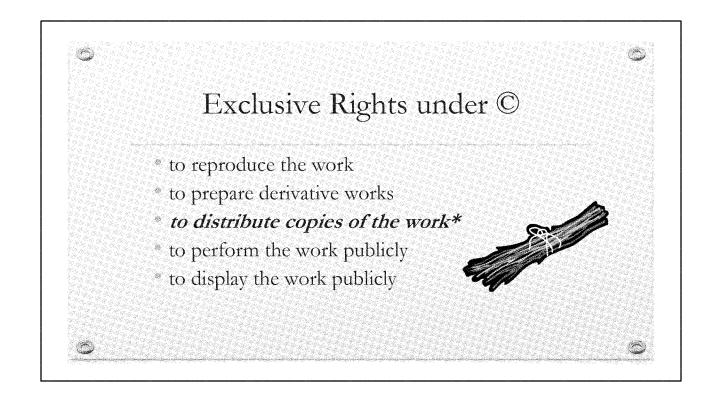




Statutory Copyright Exceptions

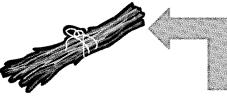
A *statutory exemption* allows individuals to exercise one of the exclusive rights of copyright

- without obtaining the permission of the copyright owner, and
- without the payment of any license fee



Language of Copyright Exceptions

17 USC §109 First Sale:



"Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title ...is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy..."

Courts have protected first sale and the secondary market

- 1908: Case about control of copyright eliminating the secondary market
- •Supreme Court described this as "hateful to the law from Lord Coke's day to ours, because it is obnoxious to the public interest."



Prosecutor of Guy Folkes and the Gunpowder plot conspirators Wrote the Insititutes of the Laws of England - foundational document of the common law

§107: Fair Use Doctrine

Preamble to fair use statute:



"Notwithstanding the provisions of sections 106...the fair use of a copyrighted work...for purposes such as **criticism**, **comment**, **news reporting**, **teaching**, **scholarship**, or **research**" is <u>not</u> an infringement of copyright."

Modern Transformative Fair Use

Four Factors of Fair Use:

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Development of Transformative Fair Use

- (1) Does the use **transform the material**, by using it for a **different purpose**?
- (2) Was the **amount taken appropriate** to the new purpose?

Fair Use Meets First Sale

The Legalities of Controlled Digital Lending

Controlled Digital Lending Elements

- Legitimately owned copy
- "Own to Loan Ratio"
- Digital Rights Management

Purpose and Character of Use

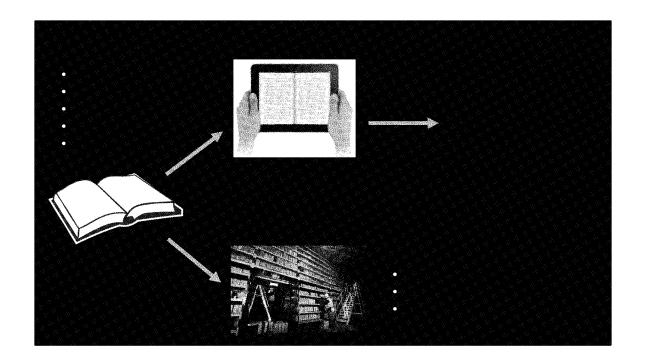
- Possibly transformative
- Not commercial
- Underlying purpose is the same as the exhaustion doctrine
- No additional copy is being used

Nature of & Amount Used of Work

- Largely neutral
- Context dependent

Market Effect

- Library owns a legitimate copy of the book
- The digital copy substitutes for the owned copy
- Same damage as using its acquired item
 - Technology



About controlled digital lending

- Legal considerations
 - Legal basis for use
 - Risk of litigation
 - Risk of losing a lawsuit
- How to assess these risks?
 - https://controlleddigitallending.org/
 - FAQ on Myths and Realities of CDL
 - White Paper on CDL: http://bit.ly/FUW2019Hansen

Controlled Digital Lending is not new!

- Origins: Michelle Wu, "Building a Collaborative Digital Collection: A Necessary Evolution in Libraries"
- Internet Archive created the "Open Library: Digital Lending Library" CDL-like system – running for the past 8 years.

Controlled Digital Lending in use....

- Now 16+ libraries have harnessed a CDL system to loan their digital copies of books.
 - Boston Public Library
 - Allen County Public Library (genealogical collection)
 - Georgetown Law Library
 - MIT Press (selected back catalog)
 - Houghton Mifflin Harcourt (entire back catalog)
 - And more....

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Other Controlled Digital Lendings?

- A new report from the British Library, commissioned by Arts Council England and the Carnegie UK Trust, has suggested a program called *Unified Digital Lending*
 - a single, publicly-run service devoted to the free digital 'lending' of books and other copyright content that would otherwise only be available on a commercial basis

For CDL, Libraries Should

- (1) ensure that original works are acquired lawfully;
- (2) apply CDL only to works that are owned and not licensed;
- (3) limit the total number of copies in any format in circulation at any time to the number of physical copies the library lawfully owns (maintain an "owned to loaned" ratio);
- (4) lend each digital version only to a single user at a time just as a physical copy would be loaned;
- (5) limit the time period for each lend to one that is analogous to physical lending; and
- (6) use digital rights management to prevent wholesale copying and redistribution.



Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649 (2d Cir. 2018)

- Easily distinguishable
 - Commercial
 - No control
 - No ownership
- Helpful provision
 - Transformative use



Lobbying for Fun and Nonprofit

John Bergmayer
Legal Director
Public Knowledge

shoe-leather advocacy

This summer, more than a dozen librarians and library advocates came to DC and spent the day talking to offices in the House and Senate, explaining how CDL benefits their constituencies.



IA in DC

Brewster and IA staff also flew in for in-person visits.

Later this month, there will be a closed (staff only) DC briefing on CDL and the availability of information online with IA, Wikimedia, Public Knowledge, and academics.



why in-person advocacy, aka "lobbying" is important Lobbying is not just schmoozing - it's a tool and you need a strategy.

Important for a variety of reasons - (intelligence gathering, feeding coalitions information, putting organization in position to be more effective in future, burnishing reputation, allows you to have more sophisticated tools in your advocacy toolkit).

In-person (or phone) meetings are more effective than email, letters, and petitions. Most of which no one really reads, sorry.

DC-based organizations and people like me do a lot, but we can't provide the context, the stories, or the first-hand credibility.

making CDL matter to politicians

The key is to show how CDL benefits the kinds of things politicians care about, and that actually matter to their constituencies.

Get people to do the right thing for their reasons, not your reasons.

(And show how your issue affects voters.)

- Providing access to rural patrons who find it challenging to physically check out a book;
- Protecting materials from damage in natural disasters from fire to floods;
- Saving the cost of transporting books to other branches to be loaned;
- Allowing access to rare, fragile books or those out of print and not in circulation;
- Preserving vulnerable cultural heritage materials for indigenous people;
- Supplementing materials at K-12 and university libraries that are suffering budget cuts;
- Providing historical context and fighting misinformation online; and
- Increasing access for people with disabilities, the elderly and students in off hours.

it is fun and anyone can do it

You are there to talk about things that you know about. You are the expert. There's no reason to be nervous when you're in your comfort zone!

But make sure you:

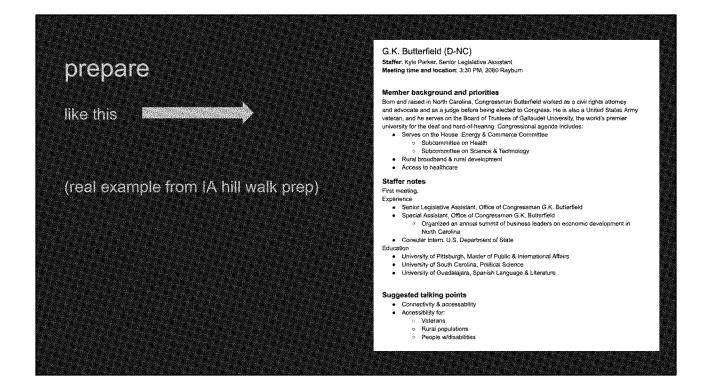
Are well prepared on substance and process (and realistic about what you don't know)

Are realistic about what you can achieve

Are respectful of others' time and opinions

Listen carefully

Willing to play the long game and build a relationship that may not have have tangible benefits immediately, but can yield successful results over the long term



Understanding the policies you want adopted/not adopted - being able to make the case for/against them

Understanding the process, calendar, logistics of policymaking. Inaction & delay is the default

Gathering, acting on, and dispensing intelligence - what are policymakers thinking, who are they talking to, what do they find persuasive, how do they make decisions

Know what you want to accomplish (or what you want to stop from being accomplished) - best case scenario

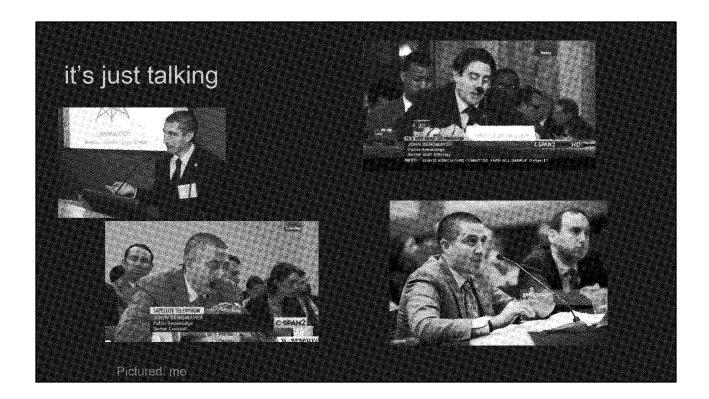
Know what is a realistic outcome that you would be willing to accept

Who your allies are - policymakers as well as civil society, industry, academics, etc. - and how to best deploy them

Who you're trying to influence - who are they, what they're likely to know, what do they care about, who do they listen to?

Who your champions are – who will go to the mat for your position, who will stand in front of the train? Key is to find them allies, bolster them

Understand the process and calendar & how it can work for or against you



- Say who you are, your organization
- Connection to district
- Don't be afraid of small talk
- Dress at the same level as the people you're meeting (depends on whether Congress is in session or not, usually)
- Brief overview of your issue
- What are you asking for?
- Tailor your message
- You want it two-way—don't do all the talking.
- Ask questions and take notes
- Be friendly and collegial
- Try to have a leave-behind. But more is not better
- Send an email the next day saying thanks and attaching any extra promised materials

Getting to "Open."

Heather Joseph Executive Director, SPARC

